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May 3, 1993

MAY - 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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96086.012BY HAND DELIVERYMs. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554Re: WBNS TV Inc. Petition for Reconsideration
of Redesignation of Columbus, Ohio
Television Market, MM Docket Nos. 92-259,
90-4, and 92-295, RM-8016

Dear Ms. Searcy:

Enclosed for filing on behalf of WBNS TV Inc. are an original and eleven (11) copies of a Petition for Reconsideration of the Commission Order modifying the Columbus, Ohio television market to include Chillicothe, Ohio in a hyphenated market designation. This modification was ordered pursuant to the Commission's Report and Order In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, in the above referenced dockets.

~~If there are any questions concerning this matter, please~~

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY - 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
Implementation of the Cable Television)	
Consumer Protection and Competition)	MM Docket No. <u>92-259</u>
Act of 1992)	
Broadcast Signal Carriage Issues)	
Reexamination of the Effective)	
Competition Standard for the)	MM Docket No. 90-4
Regulation of Cable Television)	
Basic Service Rates)	
Request by TV 14, Inc.)	
to Amend Section 76.51 of the)	MM Docket No. 92-295
Commission's Rules to Include)	RM-8016
Rome, Georgia, in the Atlanta,)	
Georgia, Television Market)	

To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to Rule 1.429 of the Commission's Rules, WBNS TV Inc., the licensee of television station WBNS-TV in Columbus, Ohio, hereby petitions for reconsideration of the Commission's Report and Order released April 2, 1993, in the above-referenced docket, (the "Report and Order"), to the extent it amends Commission Rule 76.51 to designate the Columbus, Ohio television market as the Columbus-Chillicothe television market. WBNS-TV requests that the Commission rescind this amendment and act, if at all, only on the basis of a separate notice and comment rulemaking proceeding.

I. THE COMMISSION FAILED TO PROVIDE ADEQUATE NOTICE AND OPPORTUNITY FOR COMMENT ON THE CHANGE IT ADOPTED, AND FAILED TO ARTICULATE REASONS FOR THE CHANGE.

In its Report and Order, the Commission modified the Columbus, Ohio market designation and two others. Report and Order ¶ 49. Prior to doing so, the Commission had never published any notice that it intended to change the Columbus designation. The Commission did not receive comments on the Columbus change from any party other than its proponent, which merely resubmitted an updated version of a Petition for Rulemaking it had filed in 1988, on which the Commission has never acted and which has itself never been placed on public notice. In ordering the market modifications, the Commission explained itself only by stating that the changes were "warranted" by evidence provided by the commenting parties. Id.

In the Notice of Proposed Rule Making preceding the Report and Order, 7 F.C.C. Rcd. 8055 (1992) ("Notice"), the Commission had sought comment regarding general procedures for modifying the market designations in Section 76.51. Notice ¶ 22. Among other queries, the Commission asked for comment on whether individual market designations should be modified in response to individual rulemaking petitions. Id. Nowhere did the Notice propose or invite comment on the modification of the Columbus market designation.^{1/}

^{1/} The Notice generally requested comment on whether modifications to Section 76.51 were necessary to reflect "current market realities," but explained that request as seeking particular comment on whether it should use Arbitron's list of market designations. Notice ¶ 22. Since both the Arbitron list and Section 76.51 designated the
(footnote continued)

The Commission has repeatedly recognized that modifications to Section 76.51 may only be made pursuant to notice and comment rulemaking proceedings. For example, in the Report and Order, the Commission expressly reconfirmed the procedure to be followed in handling requests for market modifications:

We expect that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals. Interested parties will then have a full opportunity to participate in the proceeding and to react to the proposal.

Report and Order ¶ 49, n. 150.

Moreover, previous modifications to Section 76.51 were made only after the Commission issued specific notice and received comments. In the Matter of Amendment of § 76.51, Major Television Markets (Orlando-Daytona Beach, Melbourne, and Cocoa, Florida), 57 R.R. 2d Cases 685 (1984); In the Matter of Amendment of § 76.51, Major Television Markets (Fresno-Visalia, California), 57 R.R.2d Cases 1122 (1985). In the latter case, the Commission dismissed a challenge to the adequacy of notice raised by an interested party, not on the ground that public notice was unnecessary, but because proper notices had been issued and specifically incorporated into the rulemaking proceeding, the express purpose of which was to consider specified additions to the market.

By contrast, the Commission modified the Columbus market designation here without receiving any comments from interested parties, based solely on a Petition for Rulemaking originally filed in 1988. The Commission did not at any time act on this

market as "Columbus," not "Columbus-Chillicothe," however, interested parties were not put on notice that any change in the Columbus market designation would be considered.

petition, issue notice of its filing or seek comment on the specific proposal to modify the Columbus market. Nor was the pendency of the petition disclosed or referred to in the Notice by which this proceeding was commenced. Thus, interested parties were effectively foreclosed from submitting comments or otherwise participating in the decisionmaking process.^{2/}

Indeed, the Commission virtually concedes the impropriety of its ex parte modification of the Columbus market designation in explaining its rejection of a separate proposal to add Athens to the Atlanta market designation. Report and Order n. 149. There, the Commission added Rome to the market designation, based on the comments of interested parties received in a separately docketed rulemaking proceeding, which it consolidated with this proceeding. But the Commission expressly declined to add Athens to the market designation at the request of one of the commenters in that proceeding, on the ground that the original notice specified only Rome, and adding Athens could be accomplished only after issuance of a new rulemaking proposal. Id.

It is a basic requirement of administrative rulemaking that substantive changes in agency rules may not be adopted without public notice that allows comment on the specific proposed rule. Reeder v. Federal Communications Com'n, 865 F.2d 1298, 1304-05 (D.C.Cir. 1989). It is equally clear that an agency may not

^{2/} Triplet & Associates refiled its 1988 Petition for Rulemaking as its Comments in this proceeding. It did not serve its Comments on any interested parties. The Commission did not disclose that it was considering any change to the Columbus market until it summarily announced that it had already granted Triplet's request.

Here, only Triplett & Associates, Inc., the petitioning party, had notice of its proposed modification to the Columbus market designation. All other interested parties were effectively

Here, only Triplett & Associates, Inc., the petitioning party, had notice of its proposed modification to the Columbus market designation. All other interested parties were effectively

articulated no basis whatever for its decision to modify the Columbus market. No grounds or factual circumstances were specified. Thus, even if the modification were not a fait accompli, precluding comment or opposition, the Commission failed to state factual or policy grounds upon which it was based.

II. IF PROPER NOTICE AND COMMENT PROCEDURES ARE FOLLOWED, INTERESTED PARTIES WILL PROVIDE EVIDENCE THAT CHILLICOTHE SHOULD NOT BE INCLUDED WITHIN THE COLUMBUS MARKET

WBNS-TV believes that the Commission would not have modified the Columbus market designation as it did if it had first solicited and received comments from other interested parties. If the Commission rescinds its ex parte decision and proceeds instead after publishing specific notice of the proposed change, interested parties will provide evidence that Chillicothe lacks

summarily announced in the Report and Order and follows proper notice and comment procedures instead.

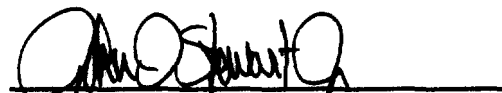
CONCLUSION

The Commission's amendment of Section 76.51 of its Rules to add Chillicothe to the Columbus market designation was adopted without the required notice and comment and without a sufficient explanation of the basis of the change. If the Commission were to commence a proper notice and comment proceeding to consider whether the change is in fact justified, interested parties would present evidence demonstrating that it is not. Accordingly, WBNS-TV respectfully requests that the Commission rescind its amendment to the Columbus, Ohio, market designation and consider such an amendment, if at all, only after commencing a separate rulemaking proceeding providing for proper notice and comment.

Respectfully submitted,

WBNS TV Inc.

By



John I. Stewart, Jr.
Katherine K. White

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Its Attorneys

May 3, 1993